Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1066

EUGENE ENSLIN,

Petitioner,

v.

DARRYL WALLFORD, Superintendent, New Hanover County Prison Unit, North Carolina Department of Correction,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. CARRINGTON BOGGAN
Lambda Legal Defense
and Education Fund, Inc.
5 East 57th Street
New York, N. Y. 10022

Attorney for Petitioner

(6945)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

TABLE OF CONTENTS

	Page
Table of Authorities	i
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	10
Appendix	1a
Decision and order of the United States Court of Appeals for the Fourth Circuit	1a
Decision and order of the United States District Court for the Eastern District of North Carolina	4a

TABLE OF AUTHORITIES

Cases	Page
Berg v. Claytor, No. 76-0944 (D.D.C., May 27, 1977)	11
Carey v. Population Services International, ___ U.S. ___, 52 L. Ed. 2d 675 (1977)	11, 12, 13, 14, 15
Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901 (1976)	2, 10, 11, 12, 13, 15
Eisenstadt v. Baird, 405 U.S. 438 (1972)	14
Enslin v. North Carolina, 288 U.S. 245 (1975)	9
Enslin v. North Carolina, 425 U.S. 903, reh. denied 425 U.S. 985 (1976)	9
Hicks v. Miranda, 422 U.S. 438 (1975)	4
Louvisi v. Slayton, 539 F. 2d 349 (4th Cir. 1976), cert. denied 45 U.S.L.W. 3399 (1976)	11
Matlovich v. Secretary of the Air Force, 2 Sex. L. Rptr. 53 (D.D.C. No. 75-1750, July 16, 1976)	11
People v. Enslin, 25 N.C. App. 662 (1975)	9
People v. Rice, People v. Mehr 41 N.Y. 2d 1018 (1977)	11
Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977)	11

Stanley v. Georgia, 394 U.S. 557 (1969) 14

Constitution
U.S. Constitution, First, Fourth, Fifth, Ninth, Fourteenth Amendments 2,3,10

Statutes
North Carolina General Statute 14-177 . . . . . .2,3,4, 6,8, 12,13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

EUGENE ENSLIN,

Petitioner,

v.

DARRYL WALLFORD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Eugene Enslin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States District Court for the Eastern District of North Carolina dismissing petitioner's application for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported, and is set forth in the Appendix hereto, infra pp. 1a-2a. The opinion of the United States District Court for the Eastern District of North Carolina is unreported and is set forth at Appendix pp. 4a-6a.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was filed on November 1, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

A. Was the Court of Appeals' determination that this Court's summary affirmance in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901 (1976) was dispositive of the primary issue raised in this case erroneous?

B. Does North Carolina General Statute 14-177 violate the constitutional rights of liberty and privacy guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution?

C. Is North Carolina General Statute 14-177 unconstitutionally vague?

D. Does North Carolina General Statute 14-177 violate the Establishment Clause of the First Amendment?

E. Does North Carolina General Statute 14-177 violate the Equal Protection Clause of the Fourteenth Amendment?

F. Was petitioner's prosecution under North Carolina General Statute 14-177 so arbitary as to deny him due process and equal protection of the law?

STATUTE INVOLVED

North Carolina General Statute §14-177:

> "If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, an adult, was convicted of performing an act of oral sex, in his own home, with a consenting male adult. The indictment charged that on June 7, 1974, petitioner "unlawfully, willfully and feloniously did commit the abominable and detestable crime against nature with Herbert P. Morgan, a male person."(R. 2).* He was tried and convicted by a jury on his plea of not guilty and was sentenced to a one year term of imprisonment.

At trial, Detective Sam Hudson of the Jacksonville, North Carolina Police Department, testified on behalf of the

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* The symbol "R" refers to the transcript of the record at trial.

prosecution. On cross-examination he stated that he had known the petitioner to be a homosexual, (R. 16), and that he therefore wished "to run [petitioner] out of town" (R. 16) by contriving to have petitioner violate §14-177. He stated further that he therefore intentionally sent a seventeen year old member of the U.S. Marine Corps, Herbert P. Morgan, who was not a homosexual (R. 13), to entice petitioner into committing the act of sodomy. (R. 16). As Detective Hudson himself put it,

> This was a deliberate and planned effort on my part using this 17 year old prosecuting witness, Herbert Morgan, to set Mr. Enslin up so that I could prosecute him for homosexual conduct. (R. 17).*

Hudson further stated that he had been employed by the police department for eight years and that he had no knowledge of any other arrests for the crime against nature during those years. (R. 13, 16, 17).

Herbert Morgan confirmed that Detective Hudson had asked him to approach petitioner and present him with the opportunity to commit the crime against nature with him. He testified that Detective Hudson had asked him if he would be willing to go to the Tri-Massage Parlor, a massage parlor managed by petitioner, and give petitioner

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* The age of consent in the State of North Carolina is seventeen.

an opportunity to commit the crime against nature with him. He agreed to do so. He was given marked money to pay petitioner for his services should a request for payment be made. (R. 11, 13). On June 7, 1974, Morgan therefore went to the bookstore next to the Tri-Massage Parlor and asked for Mr. Enslin. He testified that he had never met Enslin before that date. Upon meeting Enslin in the bookstore, Morgan told Enslin that some friends of his at the base had told him to see Enslin if he was looking for a little "extra excitement." Morgan left petitioner to advise Detective Hudson of his conversation and to receive further orders. He found the detective hiding in the bushes with binoculars for the purpose of observing Morgan's and Enslin's activities.

Morgan further stated that Detective Hudson directly advised him to participate in the sex act with petitioner. (R. 11). Morgan and petitioner then went to petitioner's living quarters, which was a room behind the bookstore. Once in the room, petitioner committed the act of fellatio upon Morgan. (R. 8).

On cross-examination, Morgan stated that he was an adult at the time of the act, that he consented to the sexual act, that petitioner did not use any force, nor did money change hands. (R. 11). He further stated that it was impossible for anyone to see into the room because the room had no windows and was strictly private. (R. 11, 12). In fact, Detective Hudson testified that when he hid in the bushes across from the bookstore with a

pair of binoculars to observe the activity of the two men, he could see the men only while they were in the bookstore with the use of the binoculars, but could not see them once they entered petitioner's room where the act was committed. (R. 13, 15).

Prior to his plea of not guilty petitioner made a motion to quash the indictment based on the unconstitutionality of G.S. 14-177. A separate hearing was had on the merits of the motion to quash.

Albert D. Klassen, Jr. testified as an expert witness on behalf of petitioner, for the purpose of showing that the proscriptions of G.S. 14-177 negatively and seriously affect millions of people and that the law does not serve any legitimate purpose. Mr. Klassen is a sociological researcher on the staff of the Kinsey Institute for Sex Research in Bloomington, Indiana. He is an expert on human sexuality and has conducted his own national surveys on sex research. The Kinsey Institute has the largest archives in the world on human sexuality. Klassen testified that as part of his occupation he has familiarized himself with all the information available at the Institute on the effects and causes of homosexuality. (R. 26, 27). The court accepted Mr. Klassen as qualified to testify as a sociological researcher with a specialty in human sexuality.

Klassen testified that the act of fellatio committed by petitioner and proscribed by G.S. 14-177 is performed by a very large percentage of this country's

heterosexual and homosexual population (50% - 60% of heterosexuals practice oral sex; 20% - 30% of heterosexuals practice anal intercourse; and 35% to 40% of all American males have practiced oral sex with another male). He stated that the laws prohibiting these acts are honored more in their breach and that there are few prosecutions for the acts. (R. 28-33). He also testified that according to Kinsey and other statistics there are two to five million homosexuals in this country (R. 28) and that there is nothing unclean, unhealthy or unnatural about the prohibited sex acts. He testified that in fact sex counsellors advise people to perform these acts. (R. 29).

Mr. Klassen stated that, contrary to myth, surveys show that homosexuals are not child molesters and their sex drive is no more uncontrollable than that of heterosexuals (R. 30). He also stated that there is no evidence that children or adults can be converted to homosexuality by exposure to homosexuals and that removal of criminal sanctions will not cause an increase in the numbers of homosexuals (R. 31). He found in his interviews with homosexuals that the criminal laws did not play a preventive role in stopping their activities but only led to the acts occurring in more lonely and repressive situations. (R. 31).

According to the American Psychiatric Association homosexuals are not pathological and should not be subject to rehabilitation (R. 31). In any case, he testified that changing sexual orientation is painful, costly and almost impossible to accomplish (R. 32). Mr. Klassen

also found it to be folly to try to "rehabilitate" a homosexual by sending him or her to prisons which are limited in their populations to members of the same sex. (R. 32, 33).

Mr. Klassen testified that the National Institute of Mental Health found that there is no nexus between homosexuality and the ability to perform a job, but that homosexuals are subject to substantial employment discrimination and societal prejudice, (R. 34).

Mr. Klassen stated that, according to psychiatrists, greater social acceptance is imperative for the increased mental health of homosexuals; and in fact, he cited studies which show that suppression of sexuality in any human being, homosexual or heterosexual, is negatively correlated with mental health (R. 35).

He testified that greater acceptance of homosexuality will not undermine the institution of marriage. He found, instead, that suppression of homosexuality leads to marriage breakdowns because homosexuals are pressured into entering into marriages with heterosexuals. The marriages usually end in divorce because of sex problems. (R. 35).

The state offered no evidence to support the justification for G.S. 14-177.

At the close of the hearing petitioner moved to quash the indictment and dismiss the prosecution. Petitioner had also moved for a declaration of non-suit at the close of the state's evidence

and at the close of the hearing on the motion to quash. All the motions were denied. Petitioner appealed to the North Carolina Court of Appeals. The Court of Appeals affirmed the judgment of the Superior Court stating only that no error was found and that G.S. 14-177 was constitutional. People v. Enslin, 25 N.C. App. 662 (1975).

Petitioner filed a notice of appeal and a petition for writ of certiorari from the lower courts' decisions with the Supreme Court of North Carolina. Thereafter, the appeal was dismissed and the writ was denied without opinion. Enslin v. North Carolina, 288 N.C. 245 (1975). Petition for certiorari to the Supreme Court of North Carolina was denied by this Court, Enslin v. North Carolina, 425 U.S. 903, reh. denied 425 U.S. 985 (1976).

Petitioner then filed this habeas corpus proceeding in the United States District Court for the Eastern District of North Carolina, contending that his conviction was unconstitutional. Respondent moved to dismiss the petition, with no supporting memorandum, and petitioner filed a memorandum in opposition thereto. On January 3, 1977, the District Court entered an order dismissing the petition (Appendix p. 3a) without a hearing and without affording the petitioner an opportunity to submit expert or other testimony.

Petitioner appealed the dismissal to the United States Court of Appeals for the Fourth Circuit. On November 1, 1977, the Court of Appeals affirmed the dismissal, in a two-page decision (Appendix p. 1a), review of which is here sought.

REASONS FOR GRANTING THE WRIT

A. THE COURT BELOW ERRED IN FINDING, CONTRARY TO THE EXPRESS STATEMENT OF THIS COURT, THAT DOE V. COMMONWEALTH'S ATTORNEY WAS DISPOSITIVE OF THE PRIMARY ISSUE RAISED IN THIS CASE

This case involves the question whether the government may constitutionally prohibit private consensual homosexual activity between adults.

In dismissing the petiton for habeas corpus, the District Court below relied on Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), sum. aff'd., 425 U.S. 901 (1976), where a three-judge court had held that Virginia's sodomy statute could consitutionally be applied to private homosexual activity between consenting adult males.

In affirming the dismissal, the Court of Appeals below held:

> The constitutional question presented to the Court in that case [Doe, supra] was the same as that principally asserted by Enslin, and we agree with the district judge that the summary affirmance in Doe is appropriately dispositive of the primary issue raised in this case. (Appendix p. 1a).

Thus the Court of Appeals assumed, as have some other lower courts subsequent to this Court's summary affirmance, without opinion, of Doe v. Commonwealth's Attorney, supra, that the Court's decision there established that the constitution did not protect the right to private, adult consensual sexual conduct, whether homosexual, e.g., Matlovich v. Secretary of the Air Force, 2 Sex.L.Rptr. 53 (D.D.C. No. 75-1750, Jul. 16, 1976); Berg v. Claytor, No. 76-0944 (D.D.C., decided May 27, 1977) or heterosexual, Louvisi v. Slayton, 539 F. 2d 349 (4th Cir. 1976), cert. denied 45 U.S.L.W. 3399 (1976).

Other lower courts, however, have not construed Doe to have such implications. People v. Rice, People v. Mehr, 41 N.Y. 2d 1018 (1977), Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977).

This Court itself appeared to have answered the question of the scope of Doe v. Commonwealth's Attorney in its recent decision in Carey v. Population Services International, ____ U.S. ____, 52 L. Ed. 2d 675 (1977). There, in striking down New York State's restrictions on the right of minors to access to contraceptives, the Court noted:

> "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," infra, n. 17, and we do not purport to

answer that question now."
Id. at ____, 52 L. Ed. 2d
at 687, n. 5.

Thus the majority of the Court concurred that Doe v. Commonwealth's Attorney had not determined the extent to which the constitution prohibited state statutes regulating private consensual sexual behavior among adults, and indicated further that it was not doing so in Carey. The effect of this statement was underscored by Justice Rehquist's dissent, _____ U.S. _____, 52 L. Ed. 2d at 705, n. 2.

Accordingly, it would seem clear from the Court's explicit instruction in Carey v. Population Services International as to the extent of its prior holding in Doe v. Commonwealth's Attorney that the Court of Appeals below should not have found the primary question involved in this case - the precise question of the extent to which the constitution prohibits statutes such as North Carolina General Statute 14-177, which criminalizes private consensual sexual behavior among adults - precluded and determined by Doe, supra.

Nonetheless, the decision of the Court of Appeals below which fails to take note of Carey, supra, as well as the previously cited decisions subsequent to Doe by both federal and state courts indicates that there is great uncertainty and conflict of opinion among the lower courts concerning the proper resolution of this difficult and fundamental question of law.

Not only is this uncertainty in the law undesirable from the point of the judicial resolution of conflicts involving the issue, but, even more compellingly, it causes great anxiety and uncertainty among millions of homosexuals, whose rights of liberty and privacy in the most intimate aspect of their lives are cast in doubt.

The Court, therefore, should accept this case for review as it presents the issue in the context of an individual actually deprived of liberty and imprisoned solely for private consensual adult sexual behavior.

B. THE SUBSTANTIAL CONSTITUTIONAL QUESTIONS PRESENTED HERE HAVE NOT YET BEEN DETERMINED

The Court of Appeals dismisses in one paragraph petitioners constitutional challenges to North Carolina G.S. 14-177 on the grounds of vagueness, equal protection, and establishment of religion. From this Court's statement in Carey, however, it is clear that the Court does not consider that it has addressed the various constitutional infirmities that such statutes may be subject to, in addition to the issues of liberty and privacy.

With respect to the issues of liberty and privacy, even prior to Carey v. Population Services International, supra, petitioner would have urged that Doe v. Commonwealth's Attorney, supra, was not determinative on those issues. For the Court had previously stated that

> an unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation

> by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmance may appear to have established. Hicks v. Miranda, 422 U.S. 332, 391-392 (1975)

One of the doctrines previously announced in this Court's opinions is the doctrine, stated in Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), that

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

This doctrine of individual liberty or privacy to decide, antonomously and free from unwarranted governmental interference, matters fundamentally affecting one's private sexual life, has been recently reaffirmed by the Court in Carey v. Population Services International, supra, and has been applied in the context of private sexual matters also in Stanley v. Georgia, 394 U.S. 557 (1969).

Because, however, as indicated by the Court in Carey, there has been no definitive articularion by the Court of the extent to which this constitutional right of liberty and privacy extends to private consensual adult sexual acts themselves, the lower courts have differed among themselves on the issue, and persons such as petitioner here have suffered and been incarcerated for violations of statutes criminalizing such conduct.

The Court should now give plenary consideration to this most fundamental issue of private sexual conduct.

The Court of Appeals brushed aside petitioner's contentions below that the North Carolina "crime against nature" statute violated the First Amendment Establishment Clause and denied petitioner equal protection of the law and that his prosecution was arbitrary by stating that they were "without merit."

The decision of the three-judge District Court in Doe v. Commonwealth's Attorney itself belies the contention that petitioner's Establishment Clause claim is without merit, as the court there relied in part on Leviticus as the foundation for its decision.

Similarly, the Court of Appeal's dismissal of petitioner's claims that his prosecution was arbitrary and denied him equal protection of the law were without merit cited no authority of this Court for its holding, and flies in the face of the uncontroverted evidence,

summarized in the Statement of the Case, supra, of the arbitrary nature of petitioner's prosecution.

CONCLUSION

For all of the foregoing reaons, the petition should be granted and a plenary hearing and determination of the fundamental issues of the extent to which the state may constitutionally regulate private consensual sexual conduct among adults should be given by the Court.

Respectfully submitted,

E. CARRINGTON BOGGAN
Lambda Legal Defense
& Education Fund, Inc.
5 East 57th Street
New York, New York

Attorney for Petitioner

January 27, 1978

UNPUBLISHED

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1309

EUGENE ENSLIN, Appellant,

versus

DARRYL WALLFORD, Superintendent, New Hanover County Prison Unit, North Carolina Department of Correction, Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Argued October 3, 1977 Decided November 1, 1977

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge, and THOMSEN, Senior District Judge.*

Joel M. Gora, American Civil Liberties Union (Norman B. Smith and Michael B. Curtis, Smith, Patterson, Follin, Curtis and James; E. Carrington Boggan, Lambda Legal Defense & Education Fund., Inc.; James H. Stark, Third Year Law Student on brief) for Appellant; Edward M. Speas, Jr., Special Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellees.

* Honorable Roszel C. Thomsen,
District of Maryland
Sitting by designation.

PER CURIAM:

Eugene Enslin filed a petition for habeas corpus in the district court claiming that his conviction under the North Carolina "crime against nature" statute, N.C.G.S. 14-177, violated his constitutional rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments.[1] The petition was dismissed and Enslin has appealed.

In dismissing the petition, the district judge relied upon Doe v. Commonwealth, 403 F.Supp. 1199 (E.D. Va. 1975), where a three-judge court had held that Virginia's sodomy statute could constitutionally be applied to private homosexual activity between consenting adult males. Upon appeal Doe was summarily affirmed by the Supreme Court of the United States, 425 U.S. 901 (1976). The constitutional question presented to the Court in that case[2] was the same as that principally asserted by Enslin, and we agree with the district judge that the summary affirmance in Doe is appropriately dispositive of the primary issue raised in this case.

In regard to the other issues raised by the petitioner, the vagueness challenge is foreclosed by Wainwright v. Stone, 414 U.S. 21 (1973), and Rose v. Locke, 423 U.S. 48 (1975), and Enslin's contentions that the statute violates the Establishment Clause of the First Amendment, and that his prosecution was arbitrary and denied him the equal protection of the law are without merit. See Rhinehart v. Rhay, 404 F.2d 718 (9 Cir. 1971), and Moss v. Hornig, 314 F.2d 89 (2 Cir. 1963).

The order of the district court is affirmed.

AFFIRMED.

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1. Petitioner's conviction was affirmed by the North Carolina Court of Appeals. State v. Enslin, 25 N.C.App. 662, 214 S.E.2d 318 (1975). Petition for a writ of certiorari was denied by the Supreme Court of North Carolina. State v. Enslin, 288 N.C. 245, 217 S.E.2d 669 (1975). Certiorari was denied by the Supreme Court of the United States, sub nom, Enslin v. North Carolina, 425 U.S. 903, reh.den. 425 U.S. 985 (1976).

2. See, JURISDICTIONAL STATEMENT in the Supreme Court of the United States, October Term, 1975, John Doe, et al., Appellants, v. Commonwealth's Attorney for City of Richmond, et al., Appellees, No. 75-896.

FILED

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U. S. DISTRICT COURT
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

EUGENE ENSLIN,)
)
Petitioner) NO. 76-0149-HC
)
VS.)
) ORDER
DARRYL WALLFORD, etc.,)
)
Respondent)

This habeas petition has a confused history. The respondent answered and moved to dismiss the petition on October 18, 1976, thereby giving petitioner twenty days under Local Rule 4 to respond to the motion to dismiss. On November 9, 1976, this court entered an order extending the time for response to December 5, 1976. No response having been filed by that date, this court entered an order on December 13, 1976, dismissing the petition. On December 14, 1976, the Clerk of this court approved a stipulation, dated December 10, 1976, and signed by counsel for both parties, extending the petitioner's time to respond until December 15, 1976. On December 17, 1976, the Clerk received a brief from petitioner's out-of-state co-counsel in response to the motion to dismiss, but it was returned without filing since it lacked the signature of a member of this court's bar as required by the local rules. In light of this sequence of events, this court hereby vacates its order of December 13, 1976, considers the brief of petitioner's counsel in response to the

motion to dismiss as timely filed, and again turns to the merits of the petition.

Petitioner claims that North Carolina's "crime against nature" statute, N.C.G.S. 14-177, when interpreted to prohibit private homosexual acts between consenting adults, violates his constitutional rights to privacy under the First, Fourth, Fifth, Ninth and Fourteenth Amendments, to be free from conviction under vague statutes and to equal protection of the law as guaranteed by the Fourteenth Amendment, and to be free from state establishment of religion as assured by the First and Fourteenth Amendments. The North Carolina Court of Appeals affirmed the conviction of petitioner, 25 N.C.App. 662 (1975), and both the North Carolina Supreme Court and the United States Supreme Court denied certiorari. 288 N.C. 245 (1975), 49 L.Ed.2d 753 (1976).

In Doe v. Commonwealth Attorney for City of Richmond, 403 F.Supp. 1199 (E.D.Va. 1975), a three-judge court held that Virginia's sodomy statute could constitutionally be applied to homosexual relations between adult males, done consensually and privately, despite plaintiff's assertion of the same constitutional rights as petitioner asserts here.

The appeal to the Supreme Court in Doe presented the constitutional issues squarely; the petition read:

> "Does Virginia Code 18.1-212, as applied to sexual activity between consenting adults in private, violate defendant's constitutional rights to privacy, due process, and equal protection under First, Fourth, Fifth, Ninth and Fourteenth Amendments?"
> 44 L.W. 3448 (February 10, 1976).

In a one-sentence order, the Supreme Court summarily affirmed. 96 S.Ct. 1489 (1976).

Petitioner distinguishes Doe on the grounds that the record before the three-judge court and the Supreme Court was incomplete in that it contained no expert testimony in the fields of psychiatry, psychology, sociology and theology to demonstrate the extent to which the statute infringed the plaintiff's claimd right to privacy. Although this court has no way of ascertaining the record compiled in Doe, it notes that this petitioner was given full opportunity to present expert testimony at his trial, and the testimony produced there was part of the record on which the Supreme Court based its denial of certiorari. Furthermore, whatever additional evidence could be produced at another hearing, it would not allow this court to disregard the recent decision of the Supreme Court that the consensual, private, homosexual acts of adult males are not protected from criminal prosecution by any right to privacy guaranteed by the Bill of Rights. In language cited approvingly in Hicks v. Miranda, 422 U.S. 332, 344 (1975), the Supreme Court noted that "the lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not." Giving appropriate precedntial value to the summary affirmance in Doe, this court concludes that it is dispositive in this case.

The defendant's motion to dismiss the petition is allowed and the action is dismissed.

F. T. DUPREE, JR., UNITED STATES DISTRICT JUDGE

January 3, 1977.

Supreme Court, U. S.
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J. W. BEAN, SUPERINTENDENT,
NEW HANOVER COUNTY PRISON UNIT,
NORTH CAROLINA DEPARTMENT OF CORRECTION,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of North Carolina

ANDREW A. VANORE, JR.
Senior Deputy Attorney General

EDWIN M. SPEAS, JR.
Special Deputy Attorney General

Counsel for the Respondent

North Carolina Dept. of Justice
P. O. Box 629
Raleigh, North Carolina 27602
Telephone (919) 733-7387

DI CESARE - Printing - Washington, D.C. 20006 - (202) 331-8101

INDEX

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

REASONS FOR DENYING THE WRIT 5

CONCLUSION 11

TABLE OF CASES

Canfield v. State, 506 P. 2d 987 (Okla. 1973) *app. dism.* 414 U.S. 991 (1973), *reh. den.* 414 U.S. 1138 (1974) 7

Carey v. International Population Services, 431 U.S. 678 (1977) 5, 6

Connor v. Arkansas, 490 S.W. 2d 114 (Ark. 1973) *app. dism.* 414 U.S. 991, *reh. den.* 414 U.S. 1138 (1973) 8

Doe v. Commonwealth Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd.* 425 U.S. 901 (1976) 5, 7

Ginsberg v. New York, 390 U.S. 629 (1968) 6

Hicks v. Miranda, 422 U.S. 332, 344 (1975) 5

Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) 10

McGowan v. Maryland, 366 U.S. 420 (1961) 8

Paris Adult Theatre v. Slaton, 413 U.S. 49, 59 (1973).....10

Planned Parenthood v. Danforth, 428 U.S. 52 (1976).....5

Pruett v. State, 463 S.W. 2d 191 (Tex. 1970), *app. dism.* 402 U.S. 902, *reh. den.* 403 U.S. 912 (1971) 7

Rose v. Locke, 423 U.S. 48 (1975) 8

State v. Harward, 264 N.C. 746, 142 S.E. 2d 691 (1965) 8

State v. O'Keefe, 263 N.C. 53, 138 S.E. 2d 767 (1964), *cert. den.* 380 U.S. 985 (1965) 8

Wainwright v. Stone, 414 U.S. 21 (1973) 8

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1257(3) 1

N.C.G.S. 14-177 ..... 2, 3, 7, 8

OTHER AUTHORITIES

55 N.C.L. Rev. 1 9

IN THE

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of North Carolina are unreported, but are set forth in the Appendix to the Petition filed herein.

JURISDICTION

Petitioner erroneously cites 28 U.S.C. §1257(3) as the source of this Court's jurisdiction in this matter. We assume he intended to invoke jurisdiction pursuant to U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in relying upon the summary affirmance doctrine in deciding this case?

2. Did Petitioner's conviction under N.C.G.S. 14-177 deprive him of his constitutional rights of liberty and privacy?

3. Is N.C.G.S. 14-177 unconstitutionally vague?

4. Do the prohibitions of N.C.G.S. 14-177 reflect an embodiment of the establishment of religion?

5. Did Petitioner's conviction under N.C.G.S. 14-177 deprive him of equal protection of the laws?

STATEMENT OF THE CASE

On September 23, 1974, the petitioner, Eugene Enslin, was tried in the Superior Court of Onslow County, North Carolina upon an indictment charging him with the "abominable and detestable crime against nature." N.C.G.S. 14-177. Upon a finding of guilty of the charge and judgment of the trial court that the petitioner be confined in the State's prisons for a term of one year, petitioner appealed to the North Carolina Court of Appeals. That Court, in an opinion reported at 25 N.C. App. 662, 214 S.E. 2d 318 (1975), found "no error." The Supreme Court of North Carolina dismissed petitioner's subsequent appeal for lack of a substantial constitutional question and denied his petition for writ of certiorari. This decision is reported at 288 N.C. 245, 217 S.E. 2d 669 (1975). A petition for certiorari was then filed in this Court. That petition was denied. *Enslin v. North Carolina*, 425 U.S. 903, *reh. den.* 425 U.S. 985 (1976).

On September 7, 1976, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina contending, on a number of grounds, that N.C.G.S. 14-177 was unconstitutional. Respondent answered the petition and moved to dismiss. On January 3, 1977, the District Court entered an order dismissing the petition. Upon appeal, the District Court's opinion was affirmed by the United States Court of Appeals for the Fourth Circuit. Petitioner then filed this petition for writ of certiorari.

STATEMENT OF THE FACTS

Petitioner, Eugene Enslin, owned and operated a combination massage parlor, pornographic bookstore, bar and sporting goods store in Jacksonville, North Carolina. (Rp 14)[1] On June 7, 1974, Herbert C. Morgan, a seventeen year[2] old member of the United States Marine Corps stationed at nearby Camp Lejeune, visited the bookstore at the request of Detective Sam Hudson of the Jacksonville Police Department. Morgan's purpose in visiting the bookstore was to give petitioner an opportunity to solicit Morgan's participation in an act of fellatio. Marked money was given to Morgan by Detective Hudson should the petitioner request money in payment for his services. (Rpp 5, 6 and 12) Upon entering the bookstore, Morgan asked the clerk if he could speak with the petitioner. The clerk replied that petitioner was out of the store but would soon be back. Two

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[1]The symbol "R" refers to the record on appeal filed in connection with petitioner's State Court appeals.

[2]At page 4 of the petition it is stated that the age of consent in North Carolina is seventeen. Respondent is not aware of any statutory or case law in the State of North Carolina establishing the age of consent for acts of sodomy or other related acts at seventeen.

or three minutes later, petitioner approached Morgan and stated, "I hear you are looking for me." Morgan asked if they could speak in private. Morgan and petitioner then went outside the bookstore and Morgan advised petitioner that he was just out of "bootcamp" and was looking for "a little excitement." Petitioner advised Morgan that the girls in the massage parlor did not provide that "excitement," but that he could if Morgan would first get a massage. (Rpp 6 and 7)

Morgan advised petitioner that he had to go somewhere but would be back in a few minutes. Morgan left the bookstore and went to talk with Detective Hudson who was waiting in a nearby field. Morgan advised Hudson of his conversation with the petitioner. Hudson then asked Morgan to return to the bookstore. (Rp 7)

Morgan returned to the bookstore and discovered that petitioner was not there. Morgan then went into the adjoining massage parlor and asked for petitioner. A woman in the massage parlor advised Morgan that petitioner was out to supper but would be back soon. Morgan asked if he could have a massage while he was waiting. The woman replied that he could, but upon determining that Morgan was less than eighteen years of age, refused to give him a massage. Some fifteen to twenty minutes later, petitioner came into the massage parlor and Morgan informed him that he could not get a massage because of his age. Petitioner then informed Morgan that he could still give him the "excitement" that he was looking for without the purchase of a massage. Morgan and petitioner went into the bookstore. Petitioner carried him through an area containing "peep shows" and then through a door into the back room of the bookstore. The room contained a sink, a bed, a bureau and a movie projector and screen. Petitioner turned on the projector, which was showing a pornographic movie, and asked Morgan to get undressed and lie on the bed. Petitioner then undressed, got on the bed with Morgan and performed an act of fellatio upon Morgan. (Rpp 7 and 8)

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Did Not Err in Applying the Summary Affirmance Doctrine.

Lower courts are not free to disregard the summary decisions of this Court. Indeed, lower courts '"are bound by summary decisions . . . until such time as the court informs them that they are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Petitioner argues that the Circuit Court erred in applying the summary affirmance doctrine to this case because of certain statements appearing in *Carey v. International Population Services*, 431 U.S. 678 (1977). The statement relied upon appears in a footnote to the majority opinion. That statement is:

> "We observe that the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits the state statutes regulating such behavior [private consensual sexual behavior] among adults." *Id.* at 694, note 17.

Can this statement be viewed as an instruction to the lower courts that the summary affirmance in *Doe v. Commonwealth Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976) could be disregarded? We think not. The statement relied on by petitioner is ambiguous. It can be read as an observation that the Constitution may extend to protect private consensual homosexual acts. Such a reading would carry the right of privacy far beyond the family and the home and represent a significant expansion of the right of privacy. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) for example. On the otherhand, this statement can be viewed as an observation about the uncertainty of the degree to which the right of privacy extends to protect sexual acts between *heterosexuals*, married or unmarried. Such a reading is more reasonable than the broad reading proposed by

petitioner in that it only involves a clarification of the right of privacy and not an expansion of that right.

Put bluntly, we do not believe that an ambiguous footnote forms any basis upon which a lower Federal Court may act in disregard of the summary affirmance doctrine. Accordingly, we submit that the Circuit Court correctly applied the summary affirmance doctrine in affirming the denial of petitioner's writ of habeas corpus.

II. This Case Does Not Involve the Question of the Constitutionality of State Regulation of Homosexual Acts Between Consenting Adults in the Privacy of the Home.

According to petitioner, this case squarely presents the issue of the constitutionality of State prohibition against adults engaging in consensual homosexual acts in the privacy of the home. An examination of the facts undercuts this simple characterization.

This case concerns the criminal prosecution of an adult for the blatent and open pandering and solicitation of an act of fellatio with a seventeen year old,[3] who had earlier been denied a massage by petitioner's own employees because of his age. The act of fellatio did not occur in a home or motel room; it occurred in the back room of a pornographic bookstore apparently during the regular hours of operation of the store. Thus, the real issue presented by this case is whether a State may constitutionally use its criminal statutes to prohibit the pandering of homosexual favors to minors. Undoubtedly, the states have that authority.

[3]It is, of course, beyond question that the scope of permissible State regulation is broader as to minors than as to adults. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Carey v. International Population Services, supra.*

III. The Issues Raised by the Petitioner Have Previously Been Decided by the Courts.

Throughout the long history of this case, petitioner has repeatedly raised four issues. These are:

(1) Whether the application of crime against nature statutes to homosexual acts between consenting adults is violative of the constitutional rights of liberty and privacy?

(2) Whether N.C.G.S. 14-177 is unconstitutionally vague?

(3) Whether the application of crime against nature statutes to homosexual acts between consenting adults violates the Equal Protection Clause?

(4) Whether crime against nature statutes embody the establishment of religion in violation of the Establishment Clause of the First Amendment?

Assuming for the moment that the facts of this case do present the issues described by the petitioner, it is clear that these issues have previously been determined adversely to the petitioner, by this Court and other courts.

On at least three separate occasions this Court has summarily disposed of arguments that the application of crime against nature statutes to homosexual acts between consenting adults violates the constitutional rights of liberty and privacy. See *Doe v. Commonwealth Attorney, supra; Canfield v. State*, 506 P.2d 987 (Okla. 1973) *app. dism.* 414 U.S. 991 (1973), *reh. den.* 414 U.S. 1138 (1974); *Pruett v. State*, 463 S.W. 2d 191 (Tex. 1970), *app. dism.* 402 U.S. 902, *reh. den.* 403 U.S. 912 (1971).

On two earlier occasions this Court has specifically held that crime against nature statutes virtually identical to North Carolina's are not unconstitutionally vague. See *Wainwright v. Stone*, 414 U.S. 21 (1973) and *Rose v. Locke*, 423 U.S. 48 (1975).

Petitioner's argument that N.C.G.S. 14-177 denies to him and all other homosexuals equal protection of the law because it singles out homosexuals for State regulation and prohibits their enjoyment of sex is without merit. The entire premise of this argument is without support. N.C.G.S. 14-177 is not limited to acts of homosexuals. "The crime against nature is sexual intercourse contrary to the order of nature, and in this jurisdiction embraces the offenses of sodomy, beastiality and buggery, as those offenses were known at common law." *State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965). See also *State v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767 (1964), *cert. den.* 380 U.S. 985 (1965). N.C.G.S. 14-177 then applies to acts between men, between women, between a man and a woman, and between a man and a beast. The statute makes no distinctions between crimes against nature committed by heterosexuals, homosexuals or bisexuals.

Petitioner argues that N.C.G.S. 14-177 is in violation of the Establishment Clause of the First Amendment of the Constitution for the reason that it imposes a rule of conduct on citizens for basically religious objectives. This Court has previously dismissed an appeal in which this issue was present because of the lack of a substantial constitutional question. See *Connor v. Arkansas*, 490 S.W. 2d 114 (Ark. 1973), *app. dism.* 414 U.S. 991, *reh. den.* 414 U.S. 1138 (1973). See also *McGowan v. Maryland*, 366 U.S. 420 (1961).

IV. The Issues Raised By The Petitioner Are For The Legislatures Not For The Courts.

The primary argument advanced by the petitioner throughout this protracted litigation is that State regulation of homosexual acts between consenting adults violates the constitutional rights to liberty and privacy. Petitioner's arguments in this regard are bottomed upon reasoning identical to the philosophy of John Stuart Mill as expressed in his volume *On Liberty*. Indeed, in his brief in the North Carolina Court of Appeals petitioner acknowledged his reliance upon the philosophy of Mill and discusses that philosophy at length.

Professor Frank Strong in an article entitled "Bicentennial Benchmarks" in the *North Carolina Law Review* (55 N.C.L. Rev. 1 (1976)) describes the relationship between previous decisions of this Court and the philosophy of Mill as follows:

> "Perceptive scholars have sensed that in the background of the reasoning in *Roe* [*Roe v. Wade*, 410 U.S. 113 (1973)] lies the philosophy of John Stuart Mill as expressed in his volume *On Liberty*. In this work . . . , Mill posited that 'one very simple principle' governs the dealings of society and government with the individual. This principle is that 'that the individual is sovereign,' his 'independence absolute,' save when 'harm to others' is involved." *Id.* at 99.

Professor Strong describes the inevitable result of the adoption of such a philosophy by society as follows:

> "... Mill's insistence on this one absolute principle as a guide to individual-societal relationships induces an insatiable demand for liberty that knows scarcely any bounds, certainly not those of tradition, moderation, prudence, common sense, decency, civility, or any higher law. It also breaks with the tradition of the Western world with its complete denigration of authority which preforce, must be viewed illegitimate. It erodes and finally destroys any sense of perspective..." *Id.* at 99.

Professor Strong sees the adoption of such a position by the courts as placing courts at odds with the Constitution itself. He says:

> "The view that the Court can properly act to take the leadership in developing societal consensus, even to the point of redirecting it, places the Court in a position of supremacy at odds with traditional conceptions. According such creativity to the Court in the exercise of constitutional review would implicate a complete break with inherited constitutional design. It would mean the endowment of the Court with policy making authority undreamed by, and wholly alien to the principles of, those who turn to the courts for the effective vindication of written constitutional limitations." *Id.* at 101.

Mr. Chief Justice Warren has stated that there is a "right of the nation and of the states to maintain a decent society." *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964). See also *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 59 (1973). The determination of "decency" is for the citizens of the State through their elected representatives in the Legislature. It is not for this Court or any other court.

CONCLUSION

Petitioner's conviction has been reviewed by every court in the State and Federal system. All of his arguments have been rejected. We believe that this Court, upon an examination of this brief, will again be convinced of the lack of merit in the petitioner's position and deny review.

This the 19th day of April, 1978.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

ANDREW A. VANORE, JR.
Senior Deputy Attorney General

EDWIN M. SPEAS, JR.
Special Deputy Attorney General

NORTH CAROLINA DEPT. OF JUSTICE
P. O. Box 629
Raleigh, North Carolina 27602
Telephone (919) 733-7387

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to be deposited in the United States mail, postage prepaid, and addressed as follows:

Mr. Joel M. Gora
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Mr. E. Carrington Boggan
Lambda Legal Defense Education
Fund, Inc.
5 East 57th Street
New York, New York 10022

Mr. Norman B. Smith
Mr. Michael B. Curtis
Smith, Patterson, Follin, Curtis
& James
704 Southeastern Building
Greensboro, North Carolina 27401

This 19th day of April, 1978.

Edwin M. Speas, Jr.
Special Deputy Attorney General

Supreme Court, U. S.
FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1066

EUGENE ENSLIN,

Petitioner,

v.

J. W. BEAN, Superintendent,
New Hanover County Prison Unit,
North Carolina Department of
Correction,

Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. CARRINGTON BOGGAN
Lambda Legal Defense
and Education Fund, Inc.
5 East 57th Street
New York, N. Y. 10022

Attorney for Petitioner

(7190)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

Table of Contents

	Page
Table of Authorities	i
Introduction	1
Argument	2
Conclusion	4

Table of Authorities

Case	Page
Carey v. Population Services International, 431 U.S. 678 (1977). .	2, 4
Statutes	
North Carolina General Statutes	
§ 7A-278-80 (1969)	3
§ 7A-278 (1975 Supp.)	3
§ 14-316.1 (1975 Supp.)	3
§ 14-21 (1977 Supp.)	3
§ 14-26 (1969)	3

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Introduction

Petitioner is compelled to file this reply to respondent's brief in opposition to the petition for writ of certiorari to rebut a point respondent raises in his brief which is factually and legally incorrect and potentially misleading to the Court in its consideration of the petition.

Argument

Petitioner contends that this case presents for the Court's resolution for the first time "the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," Carey v. Population Services International, 431 U.S. 678, 52 L. Ed. 2d 675, 687, n.5 (1977), which "the Court has not definitely answered." Id.

Respondent's brief in opposition to the petition for certiorari contends that this is not a case involving adult sexual conduct, since, respondent contends, he is not aware of any statutory or case law in North Carolina which establishes the age of consent for acts of sodomy or other related acts at seventeen. Thus he contends that the case involves whether a state may constitutionally use its criminal statutes to prohibit pandering homosexual favors to minors.

The statute before the Court in this case, the "crime against nature" statute, is not, of course, one which seeks to prohibit "pandering homosexual favors to minors," nor was petitioner prosecuted for violation of any such statute. It is also clear from the record in this case that the complaining witness sought out petitioner for sexual activity, upon the instigation of the local police, and that it was not the petitioner who sought out the complainant.

Furthermore, if the complaining witness, a seventeen year old member of the Marine Corps had himself been charged with "the crime against nature," he would have been tried as an adult and not as a juvenile. At the time the sexual activity took place, the juvenile juris-

diction of the North Carolina courts included only persons who had not reached their sixteenth birthday. In felony cases, such as the present one, even a fourteen or fifteen year old could be tried as an adult at the court's discretion. North Carolina Gen. Stats. § 7A-278-80 (1969)

Even after the general jurisdiction of the juvenile courts was increased in 1975 to include "any person who has not reached his eighteenth birthday, the complaining witness here, had he been charged, would have been tried as an adult since the definition of "child" expressly excludes "a member of the armed services of the United States." North Carolina Gen. Stats. § 7A-278 (1975 Supp.)

Other statutes evidence North Carolina's policy of confining the prohibition of sexual activity between adults and minors to a proscription of activity between adults and persons under sixteen or even only under twelve. Thus, the North Carolina contributing to delinquency statute, North Carolina Gen. Stats. § 14-316.1 (1975 Supp.) provides that a person is guilty of the offense if, inter alia, he or she engages in sexual intercourse with a child under 16 years of age. The North Carolina equivalent of the offense generally characterized as "statutory rape," that is, sexual relations, whether or not there was consent, with a person below a certain age, provides that the offense consists of carnally knowing a female under 12 years of age. N.C.G.S. 14-21 (1977 Supp.). Similarly, it is a misdemeanor for a female to carnally know a male under the age of 16, whether there is consent or not. N.C.G.S. 14-26 (1969). Thus, the statutory pattern clearly indicates that the complaining witness

here is an adult for the purposes of consensual sexual conduct.

Further, petitioner here was not prosecuted for child abuse, corrupting the morals of a minor or any other comparable crime.

Finally, this Court's holding in Carey v. Population Services International, supra, invalidating New York's ban on the sale of contraceptives to persons under sixteen years of age undercuts respondent's argument that petitioner's consensual relations with a seventeen year old member of the Marine Corps who sought petitioner out for such conduct, at the request of the police, would not come within whatever protection is to be afforded to private sexual conduct among consenting adults.

Conclusion

For the foregoing reasons and the reasons set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

E. CARRINGTON BOGGAN
Lambda Legal Defense
& Education Fund, Inc.
5 East 57th Street
New York, New York 10022

Attorney for Petitioner